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No. 73-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.
FILED
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WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH AND EARL TOMBLIN, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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William N. Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin (referred to collectively as "Petitioners") petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The Opinion of the Fourth Circuit (Appendix A, *infra*, pp. 1a-27a) has not yet been officially reported.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 26, 1973 (App. A., *infra*, p. 27a). By order dated July 13, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to, and including, August 25, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alleged conspiracy to cast fraudulent votes in a state primary election for the office of County Commissioner in Logan County, West Virginia, states a federal offense under 18 U.S.C. § 241.

2. Whether an indictment under 18 U.S.C. § 241 charging violation of constitutional rights must allege state action or action under color of state law, if the right allegedly violated arises under the Fourteenth Amendment.

STATUTE INVOLVED

Section 241 of Title 18, United States Code:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

STATEMENT

Petitioners were indicted on January 12, 1971, for violation of Title 18, United States Code, Section 241. The indictment alleged that the defendants conspired to injure and oppress the residents of Logan County, West Virginia, in the exercise of their constitutional rights by causing fraudulent and fictitious votes to be cast at a primary elecetion in May 1970. (See Appendix B, *infra*).

Before trial, all defendants moved to dismiss the indictment; for discovery and inspection; for a Bill of Particulars for a preliminary hearing and for full disclosure under the Omnibus Hearing Project. Except for their motion for discovery and inspection, which was granted in part, all motions were denied.

Defendants were all state officials at the time of the alleged conspiracy and trial. William Anderson was the Clerk of the County Court of Logan County. John Browning was Clerk of the Circuit Court of that county. Earl Tomblin was the Sheriff of Logan County, and Ernest "Red" Hager was one of his deputies. W. Bernard Smith was a State Senator from the Seventh Senatorial District.

Although the defendants were officials, only two of them, Anderson and Browning, had any official duties in connection with the primary election; they were responsible for distributing election supplies, preparing election ballots, maintaining the voting records of the County, and issuing and receiving absentee ballots. The indictment did not allege, and there was no evidence whatever introduced at trial, that either

Anderson or Browning used their state offices to carry out the alleged conspiracy or that they failed to discharge their election duties properly.

At trial evidence was introduced, however, to establish that the defendants had conspired with three election officials of the Mount Gay Precinct in Logan County, West Virginia, to cast fraudulent ballots in favor of Okey L. Hager for County Commissioner of Logan County in the May 1970 Democratic primary. According to the testimony of the three election officials, they cast fraudulent ballots on behalf of persons who had not voted and marked the voter registration lists to conceal their actions. The May 1970 primary involved both state and federal offices; however, as the Fourth Circuit found, the purpose of the alleged conspiracy was not to influence the outcome of any election for federal office but "to secure the Democratic nomination of Okey Hager for County Judge". (App. A., *infra*, p. 15a)

Okey Hager won the election, and his opponent Neal Scaggs then initiated a proceeding before the County Court to have the ballots cast in the Mount Gay Precinct disregarded. The election contest, which is the procedure under West Virginia law for settling contested election cases, was unsuccessful. See *State ex rel. Hager* v. *Oakley,* W.Va. , 177 S.E. 2d 585 (1970).

After a twelve day trial, all of the defendants were found guilty of violating 18 U.S.C. § 241 and each was sentenced to a maximum sentence of ten years.

REASONS FOR GRANTING WRIT

1. Petitioners were convicted under 18 U.S.C. § 241 of conspiring to secure the Democratic nomination of Okey Hager for County Commissioner of Logan County, West Virginia, through ballot box stuffing. The Fourth Circuit's holding that 18 U.S.C. § 241 encompasses a conspiracy, without racial overtones, whose only purpose is to affect the outcome of an election for a state or local office, alters existing interpretations of § 241 and greatly expands the role of federal courts in an area traditionally reserved to the States. This interpretation presents a substantial question of federal law which should be reviewed by this Court.

(a) Petitioners were indicted under one of the so-called civil rights statutes enacted during the Reconstruction period to ensure the right of Negroes to vote. See *U.S.* v. *Williams,* 341 U.S. 70 (1951). Section 241 originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140, Ch. 114, and has, with modifications not relevant here, been part of federal criminal law for over 100 years.[1] Despite its age and origins we have found no case, except the present one, in which the statute has been held applicable to a conspiracy to affect the outcome of a purely state or local election.

We have found only two Circuit Court cases which squarely faced the issue present here. *Karem* v. *U.S.,* 121 Fed. 250 (6th Cir. 1903) and *Walker* v. *U.S.,* 93

[1] Section 6, became Section 5508, Revised Statutes of 1874-1878; Section 19 of the Criminal Code of 1909 (35 Stat. 1092); Section 51 of the United States Code, 1926 Codification, (44 Stat. 462) and finally Section 241, United States Code (62 Stat. 696).

F.2d 383 (8th Cir. 1937) *cert. den.* 303 U.S. 644 (1938). Both held that conspiracies to affect the outcome of state elections did not violate the earlier versions of Section 241.[2] See also *Steedle* v. *U.S.*, 85 F.2d 869 (3d Cir. 1936).

There is no decision of this Court directly in point, but *Ex parte Siebold,* 100 U.S. 371 (1879), suggests that the civil rights statutes, of which Section 241 is a part, were not intended to apply to state and local elections. The Court stated:

> In what we have said, it must be remembered that we are dealing only with the subject of elections of Representatives to Congress. If for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of Representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts. *Id.* at 393.

See also *Fitzgerald* v. *Green,* 134 U.S. 377, (1890).

(b) The Fourth Circuit upheld the application of Section 241 to this conspiracy primarily on the authority of *U.S.* v. *Guest,* 383 U.S. 745 (1966); *U.S.* v. *Price,* 383 U.S. 787 (1966); and *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

The Fourth Circuit apparently reasoned that *Guest* and *Price* establish that 18 U.S.C. § 241 may be used

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[2] *Karem* involved Section 5508 and *Walker* Section 51.

to punish state interference with Fourteenth Amendment rights. Among those rights is the right to equal participation by all voters in state elections, *Reynolds* v. *Sims, supra.* Therefore, the Court seems to have concluded that any conspiracy to stuff ballot boxes in which state election officials take part [3] dilutes the votes of qualified voters abridging their Fourteenth Amendment rights in violation of Section 241.

In reaching this conclusion, we believe the Fourth Circuit erred. First, by relying on *Reynolds,* it confused the question of constitutional power with that of statutory construction. We have no doubt that Congress could enact legislation to punish conspiracies designed to influence the outcome of state and local elections. The question, however, is whether Congress intended to bring such activity within the scope of Section 241. There is no evidence that it did; the authority is to the contrary.

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[3] This Court made it clear in *Price* that "private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law" 383 U.S. at 794. In that case the state officials were a sheriff, a deputy sheriff and a patrolman. cf. *Screws* v. *U.S.,* 325 U.S. 91 (1945).

In the present case the Fourth Circuit held that the connivance of official "election managers" provided the necessary state action. Unlike law enforcement officials, West Virginia election managers have only the most tenuous relationship with the state. They are selected by the executive committee of the two political parties receiving the highest votes at the preceding general election, and the County Court, which makes the official appointment, has no authority to select any other person; § 3-1-28 W.Va. Code; *Williamson* v. *Mingo County Court,* 56 W.Va. 38, 48 S.E. 835 (1904); *State ex rel. Bullard* v. *County Court,* 141 W.Va. 675, 92 S.E.2d 452 (1956); *States ex rel. Tomblin* v. *Bivens,* 150 W.Va. 733, 149 S.E.2d 284 (1966). Their appointment lasts for one week and a single election; they receive nominal compensation; § 3-1-44 and by way of training are required to see a training film; § 3-1-46 W.Va. Code.

Second, the Court overlooked the nature of the statute involved in this case. It is a criminal statute. This Court has recognized on many occasions the need for precision and specificity in criminal statutes to avoid unconstitutional vagueness. See *U.S.* v. *Classic,* 313 U.S. 299 (1941). Recently this Court addressed the problem in *Guest* stating:

> Moreover, inclusion of Fourteenth Amendment rights within the compass of 18 U.S.C. § 241 does not render the statute unconstitutionally vague. Since the gravamen of the offense is conspiracy, the requirement that the offender must act with a specific intent to interfere with the federal rights in question is satisfied. [Citations omitted]. And the rights under the Equal Protection Clause described by this paragraph of the indictment have been so firmly and precisely established by a consistent line of decisions in this Court, [footnote omitted] that the lack of specifications of these rights in the language of § 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness. 383 U.S. at 753-754.

It cannot be said that the rights under the Equal Protection Clause involving state and local elections, at least as contrasted with federal elections, have been "firmly and precisely established". Even in federal elections this Court has not held that every vote must be counted equally. The strictest tests have been set forth in *Gray* v. *Sanders,* 372 U.S. 368 (1963); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969); and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969). More recently, however, this Court has permitted population variations of 16

percent in state legislative districts. *Mahan* v. *Howell*, 41 U.S.L.W., 4277 (U.S. Feb. 21, 1973)

If the population in state legislative districts may vary as much as 16 percent without violating the Equal Protection Clause of the Fourteenth Amendment, the dilution of a few votes in a state or local election certainly does not violate that clause. Any application of the criminal sanctions of Section 241 in such circumstances would be unconstitutionally vague.

(c) The use of Section 241 to punish isolated irregularities by local precinct officers in the election of local officials will greatly expand the jurisdiction of the federal courts in an area traditionally reserved to the States. We doubt that U.S. attorneys throughout the United States will use this authority to police state and local elections in any general and systematic manner; they have other more important and more burdensome duties. It is peculiarly the kind of authority which lends itself to abuse—to be exercised haphazardly, often in response to political direction.

We believe that this issue, affecting sensitive federal-state relations, should be considered by this Court.

2. The indictment failed to allege that the defendants, or any of their alleged co-conspirators, acted under color of state law, or that their activities involved "state action". The *Guest* and *Price* decisions make it clear that there can be no prosecution under Section 241 for a violation of an individual's Fourteenth Amendment rights without state action. See also *U.S.* v. *Williams, supra.*

In *Price* the indictment specifically charged that the defendants were acting "under color of the laws

of Mississippi". In *Guest* the allegation that the defendants conspired to intimidate Negroes in their equal use of state facilities "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts" was a sufficient allegation of state action to prevent dismissal of the indictment.

"Everything essential must be charged positively [in an indictment], and not inferentially", *U.S.* v. *Cruikshank,* 92 U.S. 542, 556 (1876). See also *U.S.* v. *Stirone,* 361 U.S. 212 (1960). The indictment in this case was deficient because it did not allege an essential element of the offense—that the defendants or their co-conspirators were acting under color of state law or that their alleged activities involved state action (see Appendix B).

This defect in the indictment and the failure of the District Court to grant defendant's motion for discovery and a Bill of Particulars substantially hindered defendants and their counsel in preparing their defense. Since the indictment alleged that each defendant was a state official and named no other co-conspirators, each reasonably believed that the conspiracy involved only the duties of the two named co-conspirators (Anderson and Browning) who had official election functions. This was not the case. The defendants also assumed that the indictment charged a conspiracy to influence the outcome of an election for federal office and prepared a defense accordingly. It was not until late in the fourth day of trial that defendants and their counsel understood what office the alleged conspiracy involved, who the unnamed co-conspirators were, and where the alleged

conspiratorial acts took place. As a practical matter, it was too late then to prepare an adequate defense.[4]

Since *Price* and *Guest* have opened Section 241 for use in connection with violations of Fourteenth Amendment rights, we submit that the sufficiency of an indictment charging such violations presents an important question in the administration of federal criminal law which this Court should review.

CONCLUSION

Because the decision below involves substantial questions of federal-state relations, we respectfully submit that this petition for a writ of certiorari should be granted.

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[4] The indictment charged that the purpose of the conspiracy was to obtain "certification" of fraudulent votes. After "certification" and before the indictment was handed down, two of the defendants had testified in a state election contest. Over objection, the trial court permitted the government to introduce their testimony and other evidence of post-certification activities against all of the defendants.

Admission of such evidence was erroneous and contrary to this Court's holdings in *Krulewitch* v. *U.S.*, 336 U.S. 440 (1949); *Lutwak* v. *U.S.*, 344 U.S. 604 (1953); and *Grunewald* v. *U.S.*, 353 U.S. 391 (1957).

These errors have their origin in the vague indictment in this case.